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In the Supreme Court of the United States
OCTOBER TERM, 1982

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FRED L. AND MARY A. ENGLE

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Section 613A of the Internal Revenue Code of 1954, entitled "Limitations on Percentage Depletion in Case of Oil and Gas Wells", provides that percentage depletion shall be computed in accordance with Section 613 with respect to so much of the taxpayer's "average daily production" of oil and gas as does not exceed his depletable quantity of oil and gas. The question presented is whether Section 613A(c) precludes respondents, who received advance royalties and who are otherwise entitled to the percentage depletion allowance, from claiming the deduction because there was no physical extraction of oil or gas from the properties during the year for which percentage depletion is claimed. The pertinent parts of Section 613 and Section 613A are set forth in Appendix E of the government's petition.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

-vs-

FRED L. AND MARY A. ENGLE

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

The respondents Fred L. and Mary A. Engle, respectfully request that this Court deny the petition for writ of *certiorari* seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 677 F.2d 594.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The issue in this case is whether physical extraction of oil and gas is a prerequisite to, or merely a limitation on, the availability of percentage depletion to a taxpayer who prior to physical extraction of oil or gas received advance royalty payments tied to production. The Seventh Circuit held that physical extraction is merely a limitation on the ability of a recipient of advance royalties to claim a percentage depletion deduction.

Petitioner's primary argument in support of the petition is that the decision below allegedly conflicts with the subsequent decision of the United States Court of Claims in *Farmar v. United States*, No. 15-80T (Ct. Cl. Sept. 22, 1982). The *Farmar* court itself raised substantial doubt as to the existence of a conflict. *Farmar* involved lease bonuses, a form of income which the recipient is entitled to retain regardless of whether there is ever production from the property. In *Farmar* the Court of Claims considered taxpayers who lease interests in oil and gas

properties to exploration companies. In partial consideration for the leases the taxpayers receive bonuses which are payable even if there is never production of oil or gas from the property. The *Farmar* court held that percentage depletion is not available with respect to such lease bonuses.

More importantly for purposes of the petition now before the Court, the court in *Farmar* stated that because lease bonuses are not tied to production, its decision "may not necessarily be inconsistent" with the decision of the Seventh Circuit in this case.

> Our overall views do vary from those expressed by the *Engle* case, but the ultimate holdings of the two sets of cases may not necessarily be inconsistent. We are concerned here with lease bonuses, not tied at all to actual production, and we confine our decision to that subject. The Seventh Circuit dealt with advance royalties which may possibly be considered somewhat different, and more closely related to actual production. (Pet. App. D, 73a)

Although this Court often resolves conflicts between circuit courts of appeal and the Court of Claims, such a resolution should await a true conflict. The lower courts, given the opportunity to consider both the decision below and the *Farmar* decision may well reconcile the two situations. Refusing to grant a petition for *certiorari* where a conflict might not exist is especially appropriate in a case such as this where a depletion deduction of only $1,672.00 is involved.

2. The court below considered the ambiguous language of Section 613A(c), analyzed the prior law regarding percentage depletion, noted the lack of germane legislative history, and then interpreted the statute in the manner which best reconciled the ambiguous language with the prior law. *See* Jones, *Analysis of CA-7 Engle Decision Allowing Percentage Depletion Absent Abstraction,* Journal of Taxation, Oct. 1982, 230, 234. The

Seventh Circuit's decision is a textbook example of statutory construction and does not present an important issue for which *certiorari* is appropriate.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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